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## MEMORANDUM

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**TO:** Board of County Commissioners of Leon County

**FROM:** Silvia Morell Alderman *SMA*  
Special Counsel

**CC:** Herb Thiele

**DATE:** October 25, 2004

**SUBJECT:** Summerfield PUD Concept Plan

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This memorandum is presented in summary question/answer format to help you make a decision on the Summerfield PUD Concept Plan. Part A of the memorandum sets out applicable standards for review of a PUD Concept Plan. Staff has prepared a comprehensive evaluation of all the elements required for approval. That evaluation is not addressed here except insofar as legal issues have been raised challenging the staff evaluation. Part B addresses legal issues raised by opponents of the project.

### **A. Applicable Standards**

#### **1. What Standard Governs Your Actions?**

To help you make a decision on this matter, it is important to understand the standard by which your decision must be measured.

The PUD Concept Plan review is "quasi-judicial" in nature.<sup>1</sup> Quasi-judicial board decisions are subject to a standard of review called "strict scrutiny." Under strict scrutiny

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<sup>1</sup> *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) ("Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in

review, the applicant first has the burden of showing that the "proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance."<sup>2</sup> Then, the burden shifts to the Board to demonstrate that maintaining the existing zoning classification "accomplishes a legitimate public purpose."<sup>3</sup>

If an applicant shows that the proposal is consistent with the Comprehensive Plan and complies with all procedural requirements of the PUD ordinance, then the Board must approve the application unless it can show that its decision to deny "is not arbitrary, discriminatory, or unreasonable."<sup>4</sup> Regardless of the direction that is taken (approval or denial), there must be competent, substantial evidence in the record of the proceedings to support the Board's decision.

2. What Must An Applicant Show To Receive Approval Of A PUD Concept Plan?

Article X Division 5 Section 10-915(e), *Land Development Code*, establishes the criteria for review and approval of Planned Unit Development applications. The three criteria are:

- a) consistency with the Tallahassee-Leon County Comprehensive Plan;
- b) consistency with all other ordinances adopted by Leon County; and,
- c) consistency with the purpose and intent of the Planned Unit Development district as described in Section 10-915(a) which states:
  - 1. Promote more efficient and economic uses of land.
  - 2. Provide flexibility to meet changing needs, technologies, economics, and consumer preferences.
  - 3. Encourage uses of land which reduce transportation needs and which conserve energy and natural resources to the maximum extent possible.
  - 4. Preserve to the greatest extent possible, and utilize in a harmonious fashion, existing landscape features and amenities.
  - 5. Provide for more usable and suitably located recreational facilities, open spaces and scenic areas, either commonly owned or publicly owned, than would otherwise be provided under a conventional zoning district.
  - 6. Lower development and building costs by permitting smaller networks of utilities and streets and the use of more economical building types and shared facilities.
  - 7. Permit the combining and coordinating of land uses, building types, and building relationships within a planned development, which otherwise would not be provided under a conventional zoning district.

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the application of a general rule of policy"). If approval of the PUD Concept Plan required an amendment to the Comprehensive Plan, such amendment would be deemed legislative and would be subject to the "fairly debatable" standard of review. *Martin County v. Yusem*, 690 So. 2d 1288, 1293 (Fla. 1997) ("[W]e expressly conclude that amendments to comprehensive land use plans are legislative decisions.")

<sup>2</sup> *Snyder*, 627 So. 2d at 476

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## **B. Existing Issues**

Staff and the Planning Commission have recommended approval of the application, with conditions. A number of issues have been raised by objectors to the project. They are discussed below.

### **1. Can The Board Approve The Concept Plan Without The Benefit Of A Complete EIA?**

Policy 1.1.1 of the Comprehensive Plan, Conservation Element, states that no rezoning or development shall be undertaken until the area involved is mapped and natural resources noted. Because the Concept Plan PUD is not a final rezoning action, this provision of the Comprehensive Plan is not a bar to Board action.

It has been asserted that the applicant has not complied with Article VII Division 7 Section 10-346(a) of the Land Development Code<sup>5</sup> and Article X Division 5 Section 10-915(d)(1)c.7, requiring an environmental analysis including a natural features inventory ("NFI") and an environmental impact analysis ("EIA"). Section 10-346(a) requires every application for conceptual or final PUD approval to be accompanied by an environmental analysis. Subsection (b) goes even further, saying the application "shall not be accepted for filing and processing unless an NFI has been completed and approved by the environmental compliance division." According to staff, an NFI was submitted and approved.

The ordinance states that the EIA shall be "sufficiently complete"<sup>6</sup> to allow a review of possible adverse impacts of the proposed development. This implies that something short of a complete EIA may be acceptable for a non-final, conceptual approval such as a Concept Plan PUD. However, the EIA must be approved for such purpose.

Section 10-915(d)(1)c.7 requires that a PUD concept plan include "an environmental analysis approved by the county growth and environmental management department, in accordance with the applicable provisions of the Environmental Management Act." Staff has indicated that the EIA is incomplete.

Because the EIA is incomplete, it has been proposed that the Board grant the applicant a variance from the requirements of Sections 10-346(a) and 10-915(d)(1)c.7. However, we have not found authority for Board approval of such a variance. The only variance provisions in Article VII, Environmental Management, are found in Division 9, Sections 10-376, et seq. Section 10-378(c) gives the Board of County Commissioners the authority to "grant variances to the requirements of Division 2 as they apply within any wetland, water body, watercourse, floodplain, or floodway . . . ." This section applies only to the stormwater requirements of

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<sup>5</sup> All citations in this memorandum beginning with "Article\_\_" shall be to provisions of the Land Development Code.

<sup>6</sup> Article VII Division 7 Section 10-345(b)

Division 2; it does not give the Board authority to waive the requirement of an environmental analysis, which are found in Division 7.

However, as explained above, the ordinance requiring the EIA does provide latitude for accepting an EIA that is less than complete so long as it is sufficiently complete to allow review of possible adverse impacts of the proposed development.

The Board may not consider the application unless the EIA has been approved pursuant to the applicable provisions of the environmental ordinance. It is possible that something short of a complete EIA may be acceptable for a conceptual approval, but the information available to staff must be deemed sufficient for such purpose by staff.

### Options

1. The Board may continue the item and send the application back for EIA approval by staff. This may or may not require submittal of additional information by the applicant.
2. The Board may ask staff for verbal determination of the acceptability of the EIA at the public hearing and decide accordingly.

2. Does the Portion of the Property within the Lake Protection Category Qualify for Treatment As A Closed Basin?

The PUD Concept Plan is based on the premise that there are a number of closed basins on the property that allow increased densities on the site.<sup>7</sup> It has been alleged by opponents that one of the basins was created artificially and unlawfully. Record information provided by staff indicates the basin was closed at one time and was artificially opened by ditch construction. This ditch was subsequently bermed. Staff has also noted that maintaining the basin in a closed condition is more beneficial to Lake Jackson than opening the berm. A Leon County notice of violation was rescinded. The status of the berm forming the closed basin in question is the subject of pending enforcement proceedings before the Department of Environmental Protection ("FDEP").

If it is determined by FDEP that the berm must be removed and no other lawful means exist to prevent discharge out of the basin, the closed basin in question would cease to qualify for the closed basin exemption. This determination would only affect that portion of the Concept Plan PUD located within the closed basin in question.

There is no indication in the Comprehensive Plan that a basin must be naturally (as opposed to artificially) closed in order to qualify for this exemption.<sup>8</sup> Because this determination

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<sup>7</sup> Closed basins located within the Lake Protection-designated area may be developed with the densities and intensities associated with the Mixed Use land use category, subject to satisfaction of all applicable development standards outlined in the Comprehensive Plan and LDRs. Lake Protection Future Land Use Category, Land Use Element Summary.

<sup>8</sup> Mr. George Lewis, in his memorandum to the Board, speaks of the potential damage to the Lake that might ensue if projects are permitted to qualify for exemption by artificially closing basins. That is an issue for

is conceptual and is not the final zoning decision, the Board can approve the Concept Plan based on the competent, substantial evidence in the record as to the current physical conditions of the site, with the caveat that if these conditions change, that portion of the property falling out of the exemption would not qualify for approval in the PUD final development plan.

Alternatively, if the Board determines that it does not want to make even a conceptual zoning decision without a final determination of the status of the berm, it may determine that the applicant has not provided competent and substantial evidence to support a determination that the basin in question qualifies as a closed basin. This would have to be based on the evidence in the record that there is no final decision on the status of the berm.

The Board decision must be consistent with prior practice with respect to Concept Plan approvals. If the Board has a practice of approving PUD concept plans subject to conditions subsequent, then it should avoid arbitrary and discriminatory action by following its precedent. If it has no prior history of approving PUD concept plans subject to conditions subsequent, then it is in a position to create future precedent and can take action either way.

#### Options

1. The Board may determine that the Concept Plan satisfies this condition of approval so long as the property in question retains its condition as a closed basin. The Board can provide conditions on the continued validity of the Concept Plan if the basin does not remain closed.

2. The Board may determine that non-final status of the FDEP determination on the status of the berm precludes it from approving the application at this time. In such case, the Board may permit the applicant an extension of time to resolve this issue or deny the application as presented.

3. Are the Special Development Zone A and B Requirements Applicable in Closed Basins?

Objectors have expressed a concern that the project is not in compliance with Lake Jackson Special Development Zone requirements of the Comprehensive Plan. Policy 2.2.12 of the Conservation Element of the Comprehensive Plan provides that special development zones with accompanying criteria shall be established and implemented through the LDRs. Policy 2.3.1 indicates that special development zones are intended to restrict activities that impact the quality of stormwater. The latter provision allows the LDR exclusions for closed basins to be consistent with the Comprehensive Plan.

The special development standards are found in Article VII Division 2, Section 10-192.

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further scientific consultation and possible future contemplation by the Board, but is not a basis currently for denying the exemption (now permitted by ordinance) for an artificially closed basin.



The provision sets out three subparts: Zone A, Zone B and "lake protection area." The latter comprehends undeveloped and less intensively developed areas within the Lake Jackson basin boundary. This description would include areas within Zone A and Zone B. This provision has an internal inconsistency. Section 10-192(b)(3)a. provides that a development site within a closed basin does not have to meet the limitations of the Lake Jackson special development zones, provided it meets 3 conditions. The third condition is that all other applicable development standards are met "including special requirements and restrictions specified for the particular zone if the development is located within zone A or B."

Staff has advised that this provision has been uniformly implemented in the past as excluding closed basins from the requirements of Zone A and Zone B. Given Policy 2.3.1, cited above, this interpretation is consistent with the Comprehensive Plan.

The Board should apply the provision in a manner that is consistent with past practice in order to avoid an arbitrary or discriminatory application.

#### 4. Can The Project Be Approved With A Connection To The Canopy Road?

A question has been raised regarding the proposed PUD's compliance with Comprehensive Plan Conservation Policy 3.4.10. Policy 3.4.10 reads: "Medium and high density residential, commercial and office uses will be allowed on designated canopy roads only where there is alternate access to a road other than a canopy road." The Policy implies that, although the PUD may be located on a canopy road, access to the PUD must be from an alternate road. The Planning Commission approved the PUD Concept Plan subject to, among other things, removal of the connection to the canopy road. Approval of the PUD Concept Plan with access through the canopy road would be inconsistent with the Comprehensive Plan. The Board may approve the PUD Concept Plan subject to elimination of access to the canopy road. Alternatively, the Board should deny the PUD Concept Plan.

There is discussion in staff documents to the effect that secondary access to a canopy road was permitted for emergency use only in another application. There is insufficient information available on the need for such emergency connection in this circumstance.

#### Options

1. The Board may approve the PUD Concept Plan subject to elimination of access to the canopy road.
2. The Board may deny the application on the basis of inconsistency with the Comprehensive Plan, if the applicant is unwilling to accept the limitation.

is conceptual and is not the final zoning decision, the Board can approve the Concept Plan based on the competent, substantial evidence in the record as to the current physical conditions of the site, with the caveat that if these conditions change, that portion of the property falling out of the exemption would not qualify for approval in the PUD final development plan.

Alternatively, if the Board determines that it does not want to make even a conceptual zoning decision without a final determination of the status of the berm, it may determine that the applicant has not provided competent and substantial evidence to support a determination that the basin in question qualifies as a closed basin. This would have to be based on the evidence in the record that there is no final decision on the status of the berm.

The Board decision must be consistent with prior practice with respect to Concept Plan approvals. If the Board has a practice of approving PUD concept plans subject to conditions subsequent, then it should avoid arbitrary and discriminatory action by following its precedent. If it has no prior history of approving PUD concept plans subject to conditions subsequent, then it is in a position to create future precedent and can take action either way.

#### Options

1. The Board may determine that the Concept Plan satisfies this condition of approval so long as the property in question retains its condition as a closed basin. The Board can provide conditions on the continued validity of the Concept Plan if the basin does not remain closed.

2. The Board may determine that non-final status of the FDEP determination on the status of the berm precludes it from approving the application at this time. In such case, the Board may permit the applicant an extension of time to resolve this issue or deny the application as presented.

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